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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 1211

MILTON L. STERN,
Petitioner,

vs.

THOMAS L. ROBINSON and UNITED STATES OF AMERICA,
Respondents.

FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The action of the United States Court of Appeals for the Sixth Circuit, sought to be reviewed herein, is its order dated December 15, 1967 dismissing petitioner's appeal (App. A23), which is not officially reported.

The United States District Court for the Western District of Tennessee, Western Division, on January 5, 1967 entered an order dismissing plaintiff's complaint (App. A14) which incorporated by reference the Memorandum Decision of that Court on December 28, 1966 (App. A10) which is officially reported at 262 F. Supp. 13.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit dismissing petitioner's appeal is dated December 15, 1967.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

Is an order of the District Court dismissing a complaint filed in a civil action to enjoin a United States Attorney from presenting unconstitutionally obtained evidence to a Federal Grand Jury for the purpose of seeking a criminal indictment and for the return of such illegally obtained evidence appealable?

STATUTES INVOLVED

The statute involved is Title 28 United States Code, Section 1291, which reads as follows:

> "§1291. Final Decision of District Courts. The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

On December 8, 1966, the petitioner filed an Original Complaint in the United States District Court for the Western District of Tennessee, Western Division, Civil Action No. C-66-357 (App. A2), alleging that the Internal Revenue Service obtained certain evidence from him in violation of his constitutional rights, in that agents of the Internal Revenue Service conducted an extensive criminal investigation over an extended period of time and at no time during such investigation was the petitioner advised of his constitutional rights. Details concerning the manner, means, and result of this criminal investigation are set forth in detail in the complaint.

The relief sought in the complaint was the return of all evidence obtained in violation of petitioner's constitutional rights, and for an injunction enjoining the respondents from presenting such evidence to a grand jury for the purpose of securing a criminal indictment against him. On December 14, 1966, the respondents filed a motion to dismiss the complaint (App. A9). After a hearing on December 15, 1966, upon oral argument of counsel on the motion to dismiss, the United States District Judge sustained the motion and dismissed the complaint. On December 16, 1966 the respondents presented the evidence to a Federal grand jury and an indictment was returned against the petitioner on that date. The United States District Judge filed a memorandum decision on December 28, 1966, on the action of the Court sustaining the motion to dismiss (App. A10). On January 5, 1967, a formal order dismissing the complaint was entered and filed (App. A14). The District Judge on January 16, 1967 entered an order striking part of the record in the cause (App. A15), it appearing that the substitute court reporter's

record of the remarks of the Court in sustaining the motion to dismiss reflected, in the words of the Court, "a somewhat garbled account of what the Court said." On January 25, 1967, petitioner timely filed notice of appeal (App. A16).

On March 10, 1967 defendants-appellees filed a motion in the United States Court of Appeals for the Sixth Circuit to dismiss the appeal on which the Court reserved ruling until after oral argument was had on November 29, 1967, and on December 15, 1967 the Court entered an order granting the defendants-appellees' motion to dismiss on the basis that the order of the District Court was interlocutory and unappealable.

Petitioner's action in the District Court arose under the Constitution of the United States involving construction and effect of the Fourth, Fifth and Sixth Amendments, and jurisdiction was founded on Title 28 of the United States Code, Section 1331.

ARGUMENT

It is the position of the petitioner that this action is an independent equity suit for an injunction, and that the order of the District Court dismissing the case is a final appealable order. The Court of Appeals for the Sixth Circuit held that it is "without appellate jurisdiction to review the order of the District Court declining to enjoin presentation of evidence to a grand jury."

It has been traditionally recognized that a suit in equity lies to enjoin a government official from seeking an indictment based on evidence obtained in violation of constitutional rights. *Perlman* v. *U. S.*, 247 U.S. 7 (1917); *Burdeau* v. *McDowell*, 256 U.S. 465 (1920); *Cogen* v. *U. S.*, 278 U.S. 221 (1928). In *Cogen* v. *U. S.*, this court held that

an order entered on a motion to suppress filed in the criminal case was not a proceeding independent of the pending criminal case, was interlocutory in nature, and not independently appealable. The petitioner recognizes that this is clearly the law today, and applies whether the motion is made in the criminal case under Rule 41 of the Rules of Criminal Procedure either prior to the indictment or subsequent to the indictment. However, this Court in *Cogen* clearly recognized the difference between a motion to suppress made in connection with the criminal case, and the separate independent proceeding recognized in *Perlman* and in *Burdeau* as appealable actions. These cases are still clearly the law and have not been changed by subsequent decisions.

In *DiBella* v. *U. S.*, 369 U.S. 121 (1962), cited by the Sixth Circuit as authority that the District Court's order of dismissal was not appealable, the defendant had been arrested, arraigned and released under bail. He then filed a motion to suppress evidence and for return of property seized. Before the motion was heard an indictment was returned against him. The motion to suppress was denied, and the action of the District Court appealed. This Court held that an order of a District Court granting or denying a pre-indictment motion under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress the evidentiary use in a Federal criminal trial of property allegedly procured through an unlawful search and seizure is not appealable, and stated at page 131:

> "When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information or indictment—in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial thereof'."

The Court in the *DiBella* case did not overrule *Perlman* and *Burdeau*. In *DiBella* the defendant had been arrested and arraigned, and by the above language this Court went no further than to hold that pre-indictment motions to suppress under Rule 41 are not appealable as a final decision when the criminal process has started by an arrest, arraignment, information or indictment. In the case at bar, at the time of the filing of the civil complaint in the District Court, no criminal process had been started by any arrest, arraignment, information or indictment.

The *DiBella* case was decided by the Supreme Court on March 19, 1962. The next case before the Supreme Court was *Grant* v. *U. S.*, 369 U.S. 401 (1962), decided April 2, 1962, in which the Court granted certiorari and remanded the case with instructions to dismiss the appeal. The case is reported in 291 F.2d 227. Although the opinion is not specific in this regard, it can only be assumed from reading the opinion that the motion to suppress evidence was made pursuant to Rule 41, as there is no indication in the opinion that it was an action in equity. Also on April 2, 1962, the Supreme Court in *Greene* v. *U. S.*, 369 U.S. 403 (1962) granted certiorari and remanded the case with instructions to dismiss the appeal. The case is reported in 296 F.2d 841, and was clearly a motion to suppress evidence under Rule 41, and was not an independent equity action.

The next action of the Supreme Court in this field was in the case of *Wood* v. *U. S.*, 369 U.S. 850 (1962), in which the Court on April 16, 1962, denied certiorari from the Fifth Circuit, the case being reported in 295 F.2d 772. In the *Wood* case a Negro was scheduled to be prosecuted before a Justice of the Peace by the State of Mississippi two days prior to the filing of the suit. The suit was filed by the United States Government in the United States District Court as a civil suit seeking an injunction to enjoin

prosecution of the Negro on the ground that such prosecution would violate the Civil Rights Act. The District Court denied a temporary restraining order, and on appeal the Court of Appeals held that the District Court's denial of a temporary restraining order was appealable. The Supreme Court denied certiorari, recognizing that an independent equity action, civil in nature, does lie for the purpose of enjoining a criminal action and that the District Court's order denying relief was appealable.

The next action of the Supreme Court in this field was in the case of *Hill* v. *U. S.*, 382 U.S. 956 (1965), in which the Court denied certiorari on December 13, 1965, the case being reported below in 346 F.2d 175. The opinion of the Court of Appeals reflects that the motion was filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for suppression of evidence, and the Court of Appeals held that the order of the District Court denying the motion to suppress was not an appealable order.

The Court of Appeals for the Sixth Circuit as authority for their lack of appellate jurisdiction also cites *Austin* v. *U. S.*, 297 F.2d 356 (1961). This case clearly held that an independent equity suit is available for the purpose of seeking relief to suppress evidence and enjoin a government official from presenting an indictment, and that the decision of the District Court in such a suit is appealable. This case never went to the Supreme Court, but after the *DiBella* decision, the Court of Appeals for the Fourth Circuit dismissed the case on the authority of *DiBella*, 353 F.2d 512 (1962). This action of the Court of Appeals was not taken to the Supreme Court, and it is submitted that the Fourth Circuit misapplied the *DiBella* decision to the *Austin* case. There had been no arrest or other commencement of criminal proceedings against the defendant prior to his

suit to enjoin presentation of evidence to the grand jury. Therefore, the *DiBella* case could in no way prevent an appeal of the case in *Austin*, because *DiBella* by its own language limits its ruling to cases in which there is outstanding some formal criminal step in the criminal proceedings.

Since the *DiBella* case there have been a number of actions filed in the District Courts as independent equity cases to suppress evidence and enjoin presentation of the evidence to a grand jury for indictment. At least one case, *Smith* v. *Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965), not only clearly recognized that an independent equity suit is a proper procedure for suppression of evidence and enjoining presentation of the evidence for an indictment, but also permitted an appeal from the District Court's ruling.

In *U. S.* v. *Tane*, 329 F.2d 848 (2d Cir. 1964), the Court held that the order on the motion before the District Court was appealable, because the motion not only asked for a suppression of evidence but also for a dismissal of the pending indictment. The District Court granted the motion in full, and an appeal was taken. The Court, citing *DiBella* stated:

> "It is clear that standing alone, a pretrial order suppressing evidence is not appealable."

The Court went on to recognize, however, that the motion with which it was dealing (unlike any of the motions cited in the cases hereinabove) also sought dismissal of the indictment; and, therefore, the Government under Title 18, U.S. C.A., §3731, had a right to appeal since the District Court's order was one that dismissed the indictment. We submit that this decision, by analogy, further supports the logic and reasoning that *DiBella* has not prevented an appeal in an independent equity action. Suppose the District Judge in

the case at bar had ruled in favor of the petitioner and suppressed the evidence and enjoined the respondents from using it to seek an indictment. The evidence sought to be enjoined was all of the evidence acquired by the Government and the entirety of the subsequent criminal indictment against the petitioner. The effect of such an order by the District Court would be the same as dismissing an indictment, because it prevents the acquiring of it. In such instance could it be seriously contended that the Government would not have the right of appeal, and certainly if the Government has the right of appeal, the petitioner has the right of appeal.

The action of the Court of Appeals resulted in a disposition of plaintiff-appellant's case in a way which is in conflict with the applicable decisions of this Court and *Smith* v. *Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965), and by so doing created an important question of Federal law which has not been, but should be, settled by this Court.

CONCLUSION

The District Court's order dismissing the complaint is a final order in a separate and independently recognized suit in equity. We respectfully submit that it would be an anomaly for the law to create and recognize such an action to prevent a wrongful criminal indictment and trial, and then provide no appeal from the District Court's decision.

Respectfully submitted,

CARL H. LANGSCHMIDT, JR.
DONALD W. PEMBERTON

Of Counsel:

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Memphis, Tennessee 38103

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MILTON L. STERN
vs.
UNITED STATES OF AMERICA and
THOMAS L. ROBINSON

Civil Number: C-66-357

DOCKET ENTRIES

December 8, 1966	Filed $250.00 Cost Bond
December 8, 1966	Filed Complaint
December 8, 1966	Issued Summons and handed attorney
December 9, 1966	Filed Motion for Production of Documents for Inspection and Copying
December 12, 1966	Filed Motion for Leave to Take Deposition
December 14, 1966	Filed Motion to Dismiss
December 15, 1966	Filed Motion to Quash
December 15, 1966	Filed Affidavit of W. F. Childress
December 28, 1966	Filed Memorandum Decision. Copy mailed Carl Langschmidt and copy handed U. S. Attorney
January 5, 1967	Filed Order Dismissing Complaint—copies given attorneys
January 16, 1967	Filed Order Striking Part of Record
January 25, 1967	Filed Court Reporter's Transcript of Motions of December 16, 1966
January 25, 1967	Filed Notice of Appeal
February 2, 1967	Filed Appeal Bond. Carl H. Langschmidt, Jr., surety
February 2, 1967	Filed Statement of Issues

CERTIFICATE

I, W. Lloyd Johnson, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the above index of docket entries is a true and correct copy of all relevant docket entries which appear on the docket in this office.

This 2nd day of March, 1967.

W. Lloyd Johnson, Clerk
By /s/ La Fon
Deputy Clerk

This case assigned to BAILEY BROWN, JUDGE.

COMPLAINT

(Filed in the United States District Court
December 8, 1966)

1. The plaintiff is a resident citizen of Memphis, Shelby County, Tennessee, and the defendant, Thomas L. Robinson, is the duly appointed and acting United States Attorney for the Western Division of Tennessee, which Division includes Shelby County, Tennessee.

This action arises under the Constitution of the United States, involving the construction and effect of the Fourth, Fifth and Sixth Amendments, and jurisdiction is founded on Title 28 United States Code Section 1331.

2. During the month of February 1965, Oscar Plunkett, Revenue Agent with the Internal Revenue Service of the United States Government who regularly conducts routine civil examinations of income tax returns, contacted the plaintiff and advised the plaintiff that he was checking the plaintiff's tax return for one year, which the plaintiff believes was the year 1963. Agent Plunkett questioned the

plaintiff and requested that the plaintiff furnish him certain of the plaintiff's records, which the plaintiff furnished at such time.

3. Agent Plunkett returned to the plaintiff's place of business approximately two months later, at which time Agent Plunkett questioned the plaintiff, asked for additional records and was furnished them by the plaintiff. Agent Plunkett at no time informed the plaintiff or in any way indicated to the plaintiff that he, Agent Plunkett, or the Internal Revenue Service, was conducting an investigation of plaintiff's affairs in connection with any suspected criminal violations of the Internal Revenue Code or that he, or the Internal Revenue Service, had any indication or basis to suspect the plaintiff of any such criminal violations.

4. Agent Plunkett returned to the place of business of the plaintiff again in April, 1965, at which time he was accompanied by another gentleman whom Agent Plunkett introduced to the plaintiff as Special Agent, Joe Childress. No explanation or description of the duties or functions of Agent Childress were made to plaintiff who was under the impression that Agent Childress was Agent Plunkett's superior.

The plaintiff is now advised and, therefore, avers on information and belief, that at all times material herein, Agent Childress was assigned to the Intelligence Division of the Internal Revenue Service, which Division is responsible for investigations of criminal violations of the Internal Revenue Code; and that Agent Childress' participation in the investigation of plaintiff's tax affairs was related solely to the procurement of proof to establish a criminal charge against the plaintiff and he was solely responsible for the method of procedure in, and conduct of, the investigation.

Agent Childress at this visit in April, 1965, requested that the plaintiff furnish the agents certain additional records, which records the plaintiff furnished these agents at this time.

Agent Childress and Agent Plunkett next returned to the plaintiff's place of business in late June or early July, 1965, and sought to obtain additional records of the plaintiff. The plaintiff was hesitant to permit the agents to take all of these records with them because it would unduly disrupt his business. Agent Childress then advised the plaintiff that a refusal of access to such records would be futile because they could be obtained by court order. Based upon this representation and being unaware of the criminal nature of the investigation, the plaintiff then submitted to the agents' request to inspect these records, allowing them to have access to and review these records in a room at his place of business. The two agents worked for approximately two days in the plaintiff's offices reviewing and inspecting the plaintiff's records.

5. The plaintiff had no further contact with the Internal Revenue Service or these agents until early 1966 when these agents made their final trip to his offices, examined additional records, and returned to him all of the records previously taken from him.

6. At no time during all of the above contact by these agents was the plaintiff advised by Agent Plunkett or Agent Childress that:

(1) They, or either of them, were investigating him because of suspected criminal violations of the Internal Revenue Code or that they, or either of them, were charged with the conduct of criminal investigations on behalf of the Internal Revenue Service;

(2) He was under investigation for suspected criminal violations of the Internal Revenue Code;

(3) He had the right to retain counsel and was entitled to have the assistance of counsel at all stages of the investigation;

(4) He had the right to remain silent;

(5) He was not required to make any statements or to supply any information;

(6) Any statements which he might make, or information which he might provide, might be used against him in a criminal proceeding;

(7) He was not required to make available any of his books and records; or

(8) Any information which might be obtained from his making available his books and records might be used against him in a criminal proceeding.

7. The plaintiff had no further contact with the Internal Revenue Service until February, 1966, when he received a letter from the Internal Revenue Service, Intelligence Division, concerning their investigation, which letter advised the plaintiff that the investigation had been criminal in nature and covered the years 1960 through 1964. The plaintiff promptly retained counsel, which he would have done sooner had he been aware that the nature of the investigation was criminal. The plaintiff had no knowledge prior to receiving said letter that the investigation of the Internal Revenue Service was criminal in nature; he had not been apprised at anytime prior thereto of any of his constitutional rights by Agent Plunkett or Agent Childress; and he was induced to and did surrender some of his records to the agents as a result of the improper and coercive representation that such could be obtained by a court order if he did not surrender them voluntarily.

8. The statements made by the plaintiff, the plaintiff's records, the notations made from the plaintiff's rec-

ords by the agents, all other evidence secured from the plaintiff, and any evidence acquired by the Internal Revenue Service which may have been directly or indirectly derived or based upon leads from the above evidence taken from the plaintiff, were acquired by the Internal Revenue Service in violation of the plaintiff's rights under the Fourth, Fifth and Sixth Amendments of the United States Constitution.

9. The Department of Justice of the United States of America has advised the plaintiff's attorneys by letter dated December 5, 1966, that the case of the United States of America against the plaintiff has been transmitted to the United States Attorney for the Western District of Tennessee, the defendant, the Honorable Thomas L. Robinson. A copy of this letter is attached hereto as Exhibit A. The plaintiff alleges that the case is in the hands of the defendant, Thomas L. Robinson, for prosecution of a criminal tax offense and that presentation of the evidence in question to a Federal Grand Jury to secure a criminal indictment is imminent.

10. In the exercise of this Court's inherent equitable jurisdiction, the Court has authority to suppress any and all evidence obtained in violation of an individual's constitutional rights, to require the return of all such evidence to the individual, and to enjoin the appropriate Government official from using such evidence, or any evidence directly or indirectly derived or based upon leads from such evidence, for the purpose of seeking any criminal indictment against the individual.

11. The plaintiff has no plain, adequate or complete remedy at law, and unless the defendants are enjoined as above set forth, the plaintiff will suffer irreparable damage.

WHEREFORE, THE PLAINTIFF PRAYS:

1. That the Court issue a preliminary and final injunction compelling the defendants, their agents, employees and attorneys, and all persons in active concert and participation with them, to return to the plaintiff all evidence obtained in violation of the plaintiff's constitutional rights, and that the defendants be enjoined and restrained from retaining copies of such evidence.

2. That the Court issue a preliminary and final injunction enjoining the defendants, their agents, employees and attorneys, and all persons in active concert and participation with them, from presenting any evidence so secured, including copies of such evidential material as well as all evidential materials obtained directly or indirectly from such illegally taken evidence, to a Federal Grand Jury for the purpose of securing a criminal indictment, or from using this evidence in any manner for prosecution of the plaintiff

3. That this Court grant such other and further relief as to the Court may seem just and proper.

Carl H. Langschmidt, Jr.
Donald W. Pemberton

Of Counsel:

Boone, Boone, Langschmidt, & Pemberton
1910 First National Bank Building
Memphis, Tennessee 38103

STATE OF TENNESSEE)
)
COUNTY OF SHELBY)

MILTON L. STERN, being duly sworn, deposes and says that he is a resident of Shelby County, Tennessee, and he is the plaintiff herein; that he has read the foregoing complaint and knows the contents therein; and that the same are true of his own knowledge, except as to the matters herein stated to be alleged on information and belief, and as to those matters he believes them to be true.

.....

Sworn to and subscribed before me this ..... day of ....., 1966.

.....
Notary Public

My Commission Expires: .....

NOTICE

Please take notice that the plaintiff will make application for a preliminary injunction and the same is set for hearing at the Court Room of the United States District Court for the Western District of Tennessee, Western Division, on the ..... day of ....., 1966, at ..... o'clock.....M.

Dated: ....., 1966.

Carl H. Langschmidt, Jr.
Attorney for Plaintiff

MOTION TO DISMISS

(Filed in the United States District Court
December 14, 1966)

Comes now the defendants, Thomas L. Robinson and the United States of America, and moves the Court for an Order Dismissing the Complaint and in support thereof show as follows:

1. This action is an unconsented suit against the sovereign and is barred by the Doctrine of Sovereign Immunity.

2. The complaint in this cause lacks equity because there is adequate remedy at law if and when an indictment is returned.

3. The plaintiffs have failed to state a cause of action upon which relief can be granted.

4. This proceeding is premature and no judicial action should be taken by the Court until such time, if ever, an indictment may be returned, and then an adequate remedy of law obtains under Rule 41(e), Federal Rules of Criminal Procedure.

Thomas L. Robinson
United States Attorney
By: /s/ Henry L. Klein
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Henry L. Klein, certify that a copy of the foregoing Motion to Dismiss was delivered to Carl H. Langschmidt, Jr., Esquire, and Donald W. Pemberton, Esquire, attorneys for plaintiff, at 1910 First National Bank Building, Memphis, Tennessee, this 14th day of December, 1966.

/s/ Henry L. Klein
Assistant United States Attorney
1058 Federal Building
Memphis, Tennessee

MEMORANDUM DECISION

(Filed in the United States District Court
December 28, 1966)

Plaintiff filed a civil action against the United States Attorney of this District in which he contended in substance that representatives of the Internal Revenue Service had obtained evidence from him to support an income tax fraud charge, that in obtaining this evidence plaintiff's federal constitutional rights had been violated, and that the defendant United States Attorney was about to present this evidence to the grand jury to secure an indictment. Plaintiff alleged that these representatives, during a fraud investigation, had examined his business records and had questioned him without advising him that a fraud investigation was in progress and without advising him of his right to counsel and his right to withhold information and his records. Plaintiff sought a preliminary and permanent injunction prohibiting the presentation of this evidence to the grand jury. This court then set the cause for hearing on the application for a preliminary injunction. Prior to the date of the hearing, plaintiff filed motions and applied to the court for an order requiring the production of certain documents and for an order allowing the taking of the depositions of the representatives of the Internal Revenue Service. The court denied these motions, indicating that if, at the hearing, plaintiff's testimony fairly supported his claim for a temporary injunction, the court would then require the production of the documents and would further require the defendant to present the Internal Revenue Service representatives for examination at the hearing. The defendant then filed a motion to dismiss, contending that the court did not have jurisdiction and that the complaint did not state a claim for relief.

When the application for a temporary injunction came on for a hearing, the court, with agreement of the parties, first heard argument on the motion to dismiss, which was granted, and therefore the injunction hearing was not held. While we stated in open court our grounds for granting the motion to dismiss, we are filing this memorandum decision to spell out more clearly our reasons for so doing.

It seems clear that this court has jurisdiction in equity to entertain this application for pre-indictment relief. *Perlman* v. *United States*, 247 U.S. 7, 62 L.Ed. 950 (1918); *Burdeau* v. *McDowell*, 256 U.S. 465, 65 L.Ed. 1048 (1921); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 75 L.Ed. 375 (1931); *Austin* v. *United States*, 297 F.2d 356 (4th Cir. 1961). However, pre-indictment relief is extraordinary relief. *Centracchio* v. *Garrity*, 198 F.2d 382 (1st Cir. 1952).

It should be noted at the outset that plaintiff did not allege that the representatives of the Service fraudulently or by other affirmative misconduct misled him as to the nature of the investigation, such as in *United States* v. *Lipshitz*, 137 F.Supp. 519 (D.C. E.D.N.Y. 1955) and *Matter of Bodkin*, 165 F.Supp. 25 (D.C. E.D.N.Y. 1958), the holding in the first of which cases appears to extend to the outer limits of constitutional protection in that area. Nor does the complaint allege a promise of immunity, as is dealt with in *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 9 L.Ed. 2d 357 (1963). Nor does the complaint allege that the statements made by plaintiff were not otherwise free and voluntary; nor does it allege that the records were not otherwise freely and voluntarily made available. (The complaint does allege that the agents at one point told plaintiff that his records could be obtained by subpoena if they were not voluntarily produced, but, as will be seen, this was a correct statement of the law and there-

fore was the simple truth.) The complaint does not even specifically allege that any of the statements made by plaintiff were made after the fraud investigation had begun, and the inference is that it had not begun because it is alleged that the special agent of the Intelligence Division did not take part until later. On argument, plaintiff's counsel did not stress this word-of-mouth information, indicating that little, if any, was obtained. In any event, we assume for purposes of this decision that the fraud investigation had begun and that incriminating information was obtained by the alleged questioning.

Since there is no allegation that the information obtained by questioning and the information obtained from plaintiff's records was not freely and voluntarily given or that it was obtained by fraud or promise of immunity, counsel for plaintiff, on argument, appropriately recognized that, to resist successfully this motion to dismiss, it was necessary to convince the Court that the Fifth Amendment and Sixth Amendment requirements established by *Escobedo*, 378 U.S. 478, 12 L.Ed. 2d 977 (1964) and *Miranda*, ... U.S. ....., 16 L.Ed. 2d 694 (1966), should be and are applicable here. This argument we cannot accept. It is not alleged that plaintiff's person was, or even approached being, in custody. These cases are limited to substantially "in custody" interrogation. *Hoffa* v. *United States*, ... U.S. ....., 35 L.W. 4058 (1966) and *Kohatsu* v. *United States*, 351 F.2d 898 (9th Cir. 1965), cert. denied 16 L.Ed. 2d (1966). We therefore conclude that the complaint does not state a claim for relief either as to the word-of-mouth information or as to the records.

With respect to the records of plaintiff, there is an additional reason why plaintiff is not entitled to relief, and this is that the records, as will be seen, had no Fifth Amendment protection. The complaint does not specifi-

cally allege whether plaintiff's records referred to therein were records required to be kept and to be produced by the income tax laws (26 U.S.C.A., Secs. 6001, 7203, 7602). On argument, however, plaintiff's counsel conceded that they were required to be kept and squarely took the position that, even so, such records are protected by the Fifth Amendment. This question has not yet been specifically decided by the Supreme Court with respect to income tax records. However, the Court's decision in *Shapiro* v. *United States,* 355 U.S. 1, 92 L.Ed. 1787 (1948), held that records required to be kept by the price control legislation had no such protection. In *Beard* v. *United States,* 222 F.2d 84 (4th Cir. 1955), the Court indicated, without so deciding, that the *Shapiro* case is authority for the proposition that income tax records have no such protection. The case of *United States* v. *Clancy,* 276 F.2d 617 (7th Cir. 1960), held that records required to be kept by the wagering tax were not so protected. Moreoever, there are cases in the lower courts holding specifically that income tax records required to be kept do not have Fifth Amendment protection: *United States* v. *Bouschor,* 200 F.Supp. 541 (D.C. Minn. 1961) and *Falsone* v. *United States,* 205 F.2d 734 (5th Cir. 1953). We therefore conclude, as stated, that these records of taxpayer had no such protection.

It results that the complaint will be dismissed and counsel will prepare an order for entry.

Enter this 28th day of December, 1966.

Bailey Brown, Judge
Chief Judge

ORDER DISMISSING COMPLAINT

(Filed in the United States District Court
January 5, 1967)

This cause came on to be heard upon the sworn Complaint of the plaintiff, Milton L. Stern, the Plaintiff's Motion for Leave to Take Depositions, the Plaintiff's Motion for Production of Documents for Inspection and Copying, supported by affidavit, upon the Motion to Dismiss by the defendants, Thomas L. Robinson, and United States of America, the Defendants' Motion to Quash, supported by affidavit, upon statement of counsel for the respective parties, upon the Memorandum Decision filed by the Court on December 28, 1966, which Decision is incorporated herein by reference and made a part of this Order as if copied in full, and upon the entire record in the cause, from all of which

It appears to the Court that in accordance with the findings in the Memorandum Decision filed by the Court on December 28, 1966, the Defendant's Motion to Dismiss is well taken and the Complaint in this cause should be dismissed, and

It further appears to the Court that the statement in the Memorandum Decision to the effect that plaintiff's counsel conceded that all records acquired from the plaintiff were required to be kept by the Income Tax Laws is not correct in that such concession was not made by plaintiff's counsel;

It further appears to the Court that in dismissing the Complaint in this cause it is not necessary to rule on the Plaintiff's Motion for Leave to Take Depositions and for Production of Documents for Inspection and Copying, and Defendants' Motion to Quash;

It Is, therefore, ORDERED and ADJUDGED that the Defendants' Motion to Dismiss be and the same is hereby granted and the Complaint in this cause is dismissed.

It Is Further ORDERED and ADJUDGED that the following statement on Page 4 of the Memorandum Decision filed by the Court on December 28, 1966: "On argument, however, plaintiff's counsel conceded that they were required to be kept and squarely took the position that, even so, such records are protected by the Fifth Amendment," be and the same hereby is deleted from the Memorandum Decision.

_____

Chief United States District Judge

Approved:

Thomas L. Robinson
United States Attorney
By: Henry L. Klein
Assistant United States Attorney
Carl H. Langschmidt, Jr.,
Attorney for Plaintiff

ORDER STRIKING PART OF RECORD

(Filed in the United States District Court
January 16, 1967)

When this cause came on to be heard on defendants' motion to dismiss on December 15, 1966, and the Court granted the motion, the Court stated from the bench the reasons for doing so. However, thereafter the Court prepared and filed a memorandum decision stating more fully its reasons for granting the motion to dismiss and an order has been entered in accordance with the memorandum decision. Since the substitute court reporter's transcript

of the remarks of the Court from the bench made on December 15, 1966 reflect a somewhat garbled account of what the Court said and since the Court has filed a memorandum decision heretofore referred to, it is ORDERED that the transcript of the Court's remarks prepared by the substitute court reporter not be filed and the memorandum decision will stand in their place.

ENTER this 16th day of January, 1967.

Bailey Brown, Judge
Chief Judge

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS

(Filed in the United States District Court
January 25, 1967)

Notice is hereby given that Milton L. Stern, Plaintiff, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order Dismissing Complaint entered in this action on January 5, 1967.

Carl H. Langschmidt, Jr.
Donald W. Pemberton
Attorneys for Appellant, Milton L. Stern
1910 First National Bank Building
Memphis, Tennessee

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal was served on Thomas L. Robinson, United States Attorney, by mailing a copy to his office, this 25th day of January, 1967

Carl. H. Langschmidt, Jr.

Milton L. STERN

v.

Thomas L. ROBINSON and United States of America.

Civ. No. C-66-357.

United States District Court
W. D. Tennessee, W. D.
Dec. 28, 1966.

Civil action against United States to enjoin presentment of evidence to grand jury. The District Court, Bailey Brown, Chief Judge, held that complaint which did not allege that information obtained by Internal Revenue Service representatives from questioning of plaintiff and information obtained from plaintiff's record was not freely and voluntarily given or that it was obtained by fraud or promise of immunity failed to state a claim for relief.

Complaint dismissed.

1. Courts Key 262.3(1)

District court had jurisdiction in equity to entertain an application for pre-indictment relief requesting preliminary and permanent injunction to prohibit presentation to grand jury of evidence allegedly obtained by representatives of Internal Revenue Service in violation of plaintiff's constitutional rights.

2. Courts Key 262.3(1)

Since there was no allegation by plaintiff, seeking to enjoin presentment of evidence to grand jury obtained by representatives of Internal Revenue Service respecting in-

come tax fraud charge against plaintiff who alleged that his constitutional rights had been violated, that information obtained by questioning and from plaintiff's records was not freely and voluntarily given or that it was obtained by fraud or promise of immunity, plaintiff had to convince the court that the Fifth Amendment and the Sixth Amendment requirements established by Escobedo and Miranda should be and were applicable. U.S.C.A. Const. Amends. 5, 6.

3. Criminal Law Key 412.2(2)

The Fifth Amendment and Sixth Amendment requirements established by Escobedo and Miranda decisions are limited to substantially in custody interrogation. U.S.C.A. Const. Amends. 5, 6.

4. Injunction Key 118(3)

Complaint which sought to enjoin from presentation to grand jury evidence obtained by representatives of Internal Revenue Service relating to income tax fraud charge against plaintiff but which did not allege that information obtained by questioning of plaintiff and information obtained from plaintiff's record was not freely and voluntarily given or that it was obtained by fraud or promise of immunity failed to state a claim for relief. U.S.C.A. Const. Amends. 5, 6.

5. Witnesses Key 298

Records of taxpayer required to be kept and produced by the federal income tax laws were not entitled to protection of the Fifth Amendment. 26 U.S.C.A. (I.R.C.1954) §§ 6001, 7203, 7602; U.S.C.A.Const. Amend. 5.

Carl H. Langschmidt, Jr., and Donald W. Pemberton, of Boone, Boone, Langschmidt & Pemberton, Memphis, Tenn., for plaintiff.

Thomas L. Robinson, U. S. Atty., and Henry L. Klein, Asst. U. S. Atty., Memphis, Tenn., for defendants.

MEMORANDUM DECISION

BAILEY BROWN, Chief Judge.

Plaintiff filed a civil action against the United States Attorney of this District in which he contended in substance that representatives of the Internal Revenue Service had obtained evidence from him to support an income tax fraud charge, that in obtaining this evidence plaintiff's federal constitutional rights had been violated, and that the defendant United States Attorney was about to present this evidence to the grand jury to secure an indictment. Plaintiff alleged that these representatives, during a fraud investigation, had examined his business records and had questioned him without advising him that a fraud investigation was in progress and without advising him of his right to counsel and his right to withhold information and his records. Plaintiff sought a preliminary and permanent injunction prohibiting the presentation of this evidence to the grand jury. This court then set the cause for hearing on the application for a preliminary injunction. Prior to the date of the hearing, plaintiff filed motions and applied to the court for an order requiring the production of certain documents and for an order allowing the taking of the depositions of the representatives of the Internal Revenue Service. The court denied these motions, indicating that if, at the hearing, plaintiff's testimony fairly supported his claim for a temporary injunction, the court would then require the production of the documents and would fur-

ther require the defendant to present the Internal Revenue Service representatives for examination at the hearing. The defendant then filed a motion to dismiss, contending that the court did not have jurisdiction and that the complaint did not state a claim for relief. When the application for a temporary injunction came on for a hearing, the court, with agreement of the parties, first heard argument on the motion to dismiss, which was granted, and therefore the injunction hearing was not held. While we stated in open court our grounds for granting the motion to dismiss, we are filing this memorandum decision to spell out more clearly our reasons for so doing.

[1] It seems clear that this court has jurisdiction in equity to entertain this application for pre-indictment relief. Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918); Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931); Austin v. United States, 297 F.2d 356 (4th Cir. 1961). However, pre-indictment relief is extraordinary relief. Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952).

It should be noted at the outset that plaintiff did not allege that the representatives of the Service fraudulently or by other affirmative misconduct misled him as to the nature of the investigation, such as in United States v. Lipshitz, 132 F.Supp. 519 (D.C.E.D.N.Y. 1955) and Matter of Bodkin, 165 F. Supp. 25 (D.C.E.D.N.Y. 1958), the holding in the first of which cases appears to extend to the outer limits of constitutional protection in that area. Nor does the complaint allege a promise of immunity, as is dealt with in Shotwell Mfg. Co. v. United States, 371 U.S. 341, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963). Nor does the complaint allege that the statements made by plaintiff were not otherwise free and voluntary; nor does it allege that

the records were not otherwise freely and voluntarily made available. (The complaint does allege that the agents at one point told plaintiff that his records could be obtained by subpoena if they were not voluntarily produced, but, as will be seen, this was a correct statement of the law and therefore was the simple truth.) The complaint does not even specifically allege that any of the statements made by plaintiff were made after the fraud investigation had begun, and the inference is that it had not begun because it is alleged that the special agent of the Intelligence Division did not take part until later. On argument, plaintiff's counsel did not stress this word-of-mouth information, indicating that little, if any, was obtained. In any event, we assume for purposes of this decision that the fraud investigation had begun and that incriminating information was obtained by the alleged questioning.

[2-4] Since there is no allegation that the information obtained by questioning and the information obtained from plaintiff's records was not freely and voluntarily given or that it was obtained by fraud or promise of immunity, counsel for plaintiff, on argument, appropriately recognized that, to resist successfully this motion to dismiss, it was necessary to convince the Court that the Fifth Amendment and Sixth Amendment requirements established by Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) and Miranda v. State of Ariz., 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) should be and are applicable here. This argument we cannot accept. It is not alleged that plaintiff's person was or even approached being, in custody. These cases are limited to substantially "in custody" interrogation. Hoffa v. United States, 87 S.Ct. 408 (1966) and Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965), cert. denied 384 U.S. 1011, 86 S.Ct. 1915, 16 L.Ed.2d 1017 (1966). We

therefore conclude that the complaint does not state a claim for relief either as to the word-of-mouth information or as to the records.

[5] With respect to the records of plaintiff, there is an additional reason why plaintiff is not entitled to relief, and this is that the records, as will be seen, had no Fifth Amendment protection. The complaint does not specifically allege whether plaintiff's records referred to therein were records required to be kept and to be produced by the income tax laws (26 U.S.C.A. §§6001, 7203, 7602). On argument, however, plaintiff's counsel conceded that they were required to be kept and squarely took the position that, even so, such records are protected by the Fifth Amendment. This question has not yet been specifically decided by the Supreme Court with respect to income tax records. However, the Court's decision in Shapiro v. United States, 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948) held that records required to be kept by the price control legislation had no such protection. In Beard v. United States, 222 F.2d 84 (4th Cir. 1955), the Court indicated, without so deciding, that the *Shapiro* case is authority for the proposition that income tax records have no such protection. The case of United States v. Clancy, 276 F.2d 617 (7th Cir. 1960) held that records required to be kept by the wagering tax were not so protected. Moreover, there are cases in the lower courts holding specifically that income tax records required to be kept do not have Fifth Amendment protection: United States v. Bouschor, 200 F.Supp. 541 (D.C.Minn. 1961) and Falsone v. United States, 205 F.2d 734 (5th Cir. 1953). We therefore conclude, as stated, that these records of taxpayer had no such protection.

It results that the complaint will be dismissed and counsel will prepare an order for entry.

No. 17,768

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MILTON L. STERN,
Plaintiff-Appellant,
v.
THOMAS L. ROBINSON and
UNITED STATES OF AMERICA,
Defendants-Appellees

Order

Before: CELEBREZZE, PECK, and MC CREE, Circuit Judges.

Plaintiff-appellant brought this action against the defendant agent of the Internal Revenue Service and the United States seeking the return of evidence obtained from him by the agent and an injunction enjoining the presentation of such evidence to a grand jury for the purpose of securing a criminal indictment against him. Although a formal order dismissing the complaint was not entered until after the returning of an indictment against the plaintiff-appellant, the evidence was presented to the grand jury and the indictment returned the day following the filing of the District Judge's memorandum decision sustaining the appellees' motion to dismiss. The appeal to this court is from that order of dismissal.

Appellees have here filed their motion to dismiss the appeal on the ground, among others, that the order of the District Court is not appealable, and under our previous direction that motion was heard at the hearing of the cause on its merits. It is here determined that the order from

which this appeal was perfected was interlocutory and unappealable, and that this court is "without appellate jurisdiction to review the order of the District Court declining to enjoin presentation of evidence to a grand jury." *Austin* v. *United States of America*, 353 F.2d 512 (4th Cir. 1962); see also *Di Bella* v. *United States*, 369 U.S. 121 (1962). Therefore,

IT IS ORDERED that the motion of the appellees to dismiss should be and is granted, and this cause is hereby dismissed.

Entered by Order of the Court
/s/ Carl W. Reuss
Clerk

CERTIFICATE OF SERVICE

I certify that two copies of this petition for certiorari were served on the Solicitor General, Department of Justice, Washington, D. C. 20530, by mailing them airmail, postage prepaid, to his office, this 6th day of March, 1968; and that two copies were served on Thomas L. Robinson, United States Attorney, Federal Building, Memphis, Tennessee 38103, by mailing them to his office, this 6th day of March, 1968.

Carl H. Langschmidt, Jr.

CARL H. LANGSCHMIDT, JR.